86-1020

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TED G. GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD STANLEY SCOTT, ESQ.
MALLEY, SCOTT, KOFFMAN & HESTON
Suite 400
2600 Colorado Avenue
Santa Monica, California 90404
(213) 453-6002
Attorneys for Petitioner
TED G. GREEN

QUESTIONS PRESENTED FOR REVIEW

1. Is Ted G. Green's service of the Complaint upon the Veterans Administration sufficient to impute the necessary notice to the United States to allow relation back of supplemental pleadings under Rule 15(c) of the Federal Rules of Civil Procedure?

2. Is the notice requirement of Rule 15(c) of the Federal Rules of Civil Procedure limited to the period of the statute of limitations or is compliance within a reasonable time for the service of process thereafter satisfactory, and, if so, did Plaintiff constructively comply?

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JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed was filed September 30, 1986, and judgment was entered September 30, 1986. 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

FEDERAL RULE OF CIVIL PROCEDURE 15(c)

[text]

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant." [Emphasis added.]

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On June 23, 1981, Petitioner underwent major surgery at the Wadsworth Veterans Administration Hospital in West Los Angeles. As a result of this surgery, Petitioner's esophagus was perforated. In an attempt to correct this aggravated condition, a second operation was performed on June 24, 1981. This surgery not only failed fully to correct the complication which was caused by the first surgery but it further aggravated Petitioner's original condition. There was severe leakage of stomach fluids into Petitioner's chest, a very serious circumstance. As a result of these complications, Petitioner was unable to eat, drink, rinse his mouth or brush his teeth for several months until a third surgery was performed at the

Loma Linda (California) Veterans Administration hospital in November of 1982. Prior to the third procedure, the leakage of stomach fluids caused Petitioner's lung, stomach and esophagus to adhere to adjacent anatomical structures, thereby requiring extensive additional surgery.

B. PROCEDURAL BACKGROUND

A claim was filed on October 18, 1982 pursuant to the Federal Tort Claims Act. The claim was denied on March 22, 1984, and Petitioner filed a complaint in the United States District Court, Central District of California, on September 19, 1984, within the statute of limitations for such actions. However, Petitioner's counsel failed to name the proper defendant, the United States, instead naming and serving the Veterans Administration as the defendant -- an unworthy but

possibly-understandable error.

When Petitioner's counsel learned of the procedural error that had been made, the appropriate parties were served on behalf of the proper defendant. The United States Attorney was served on December 19, 1984, and the Attorney General on March 8, 1985. Then (as a "backup") on March 21, 1985, a second complaint was filed naming the proper defendant, the United States. The Attorney General and the United States Attorney were properly served with the second complaint on March 27, 1985.

On April 12, 1985, the September 19, 1984 (Case No. CV-84-7030-R) complaint was dismissed because of Petitioner's counsel's failure to name the a proper defendant. This dismissal was purely technical decision made without considering the merits of Petitioner's complaint.

The second complaint, filed in order to name the proper defendant, was also dismissed on June 27, 1985, because of technical violations of time limitations. Again the merits of the case were not considered.

On May 8, 1986, Petitioner filed an appeal to review the dismissal of the second complaint. Based on Ninth Circuit authority, said to be controlling, the Court of Appeals entered judgment on September 30, 1986, affirming the District Court's decision.

C. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

1. The Basis for Subject Matter Jurisdiction

This action arises under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, et seq. Before this

action was instituted a timely claim was presented to the appropriate agency and denied on March 22, 1984. This suit was commenced on September 19, 1984, within six months of the denial of said claim as required by 28 U.S.C. 2401(b), but was improperly captioned; a second complaint was filed on March 21, 1985.

2. Basis for Jurisdiction in U.S. Court of Appeals

Appeal was from an order of dismissal by the U.S. District Court for the Central District of California. The order is final within the meaning of 28 U.S.C. 1291 and therefore appealable.

3. Timeliness of Appeal

The order and opinion dismissing this action was entered on April 12, 1985 (dismissing the September 19, 1984 Complaint, No. CV-84-7030 R) and again on

June 27, 1985 (dismissing the March 21, 1985 Complaint, No. CV-85-1953 R). Petitioner's Notice of Appeal was filed on August 22, 1985, and was therefore timely under Federal Rule of Appellate Procedure 4(a)(1).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit in Green v. United States, No. 85-6230 (9th Cir. Sep. 30, 1986), included in full in the Appendix, is in conflict with other federal courts of appeal on the same matter. Several federal courts of appeal are in conflict over the interpretation of Federal Rule of Civil Procedure 15(c), recited in full above (pp. vii-viii). Some circuits hold that service of the complaint upon an agency would alone be sufficient to impute the necessary notice to the United States and those same circuits allow the notice required under Rule 15(c) to be within the period of the statute of limitations or within a reasonable time for the service of process thereafter. The Ninth Circuit holds that actual knowledge possessed by an agency will not

be imputed to the United States, and interprets the language of Rule 15(c) quite literally to require exacting compliance so that formal notice is conveyed within the period of the statute.

Petitioner contends, and argued such below, that the more liberal interpretation is the better one, as based on the rationales for the holdings in other circuits. This is also comfortable with this Court's firm policy that bona fide complaints be carried to an adjudication on the merits.

ARGUMENT

Petitioner mistakenly sued the Veterans Administration, a federal agency, instead of the United States, the proper defendant. Peitioner served his complaint upon the Veterans Administration within the period of limitations, and on the offices of the United States Attorney and the United States Attorney General. The latter, however, did not receive formal service until after the statute of limitations had run.

The issue on appeal is whether the United States had received sufficient notice of an original complaint so that under F.R.Civ.P. 15(c) the United States could be added as a named party to the action after the statute of limitations expired. Resolution of this issue requires an interpretation of F.R.Civ.P. 15(c) to answer the following two questions:

(1) Whether service of a complaint upon an agency is sufficient to impute the necessary notice to the United States, and (2) whether the notice required under F.R.Civ.P. 15(c) is to be within the period of the statute of limitations or within a reasonable time for the service of process thereafter.

As will be seen below, the federal courts of appeal are reaching inconsistent and in some instances seemingly harsh conclusions on similar fact patterns.

I.

SERVICE OF THE COMPLAINT UPON THE VETERANS ADMINISTRATION SHOULD BE FOUND SUFFICIENT TO IMPUTE THE NECESSARY NOTICE TO THE UNITED STATES

Pursuant to controlling law in the Ninth Circuit, actual knowledge possessed by an agency will not be imputed to the

United States. Allen v. Veterans Administration, 749 F.2d 1386, 1389 (9th Cir. 1984); Williams v. United States, 711 F. 2d 893, 898 (9th Cir. 1983). The approach to the notice requirement of F.R.Civ.P. 15(c) in the Ninth Circuit would require formal service of process within the period of the statute of limitations. Since Petitioner did not formally serve the United States Attorney's office and the Attorney General until after the statute of limitations had run, the District Court and the Ninth Circuit denied Petitioner's opportunity to prove his case.

The Ninth Circuit decision in Petitioner's case is in conflict with a decision of the Fifth Circuit on the same matter. The Fifth Circuit's approach to the notice requirement of 15(c) is that service of the complaint upon an agency

would alone be sufficient to impute the necessary notice to the United States. See, Carr v. Veterans Administration, 522 F.2d 1355, 1357-58 (5th Cir. 1975); also see Murray v. United States Postal Service, 550 F.Supp. 1211, 1212 (D.Mass 1982); following Carr.

The Fifth Circuit's approach draws support from the goal of the 1966 amendments to Rule 15(c), as reflected in the Advisory Committee's note, 39 F.R.D. 82 (1966). The present language of Rule 15(c) is a reaction to a line of cases refusing to allow an amendment to relate back when a plaintiff sued and served one government entity within the period prescribed by statute and later attempted to substitute the proper entity as a defendant. Id. at 82-82. The Advisory Committee stressed that the government received notice of the claim "within the stated period", and

it stated, "[r]elation back is intimately connected with the policy of the statute of limitations." Id. at 83.

The Advisory Committee specifically states that "notice need not be formal." Id. at 83. The Ninth Circuit's reluctance to deviate from its strict interpretation of the language in Rule 15(c) is not responsive to the Advisory Committee's language, is not responsive to the goal of the 1966 amendments to Rule 15(c), as reflected in the Advisory Committee's notes, and is not responsive to reality; further, Petitioner can find no support for such an interpretation anywhere. Finally, to deny relation back in situations such as in the case at bar is to defeat unjustly the claimant's opportunity to prove his case.

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II.

NOTICE REQUIRED UNDER RULE 15(c) IS WITHIN THE STATUTE OF LIMITATIONS OR WITHIN A REASONABLE TIME FOR THE SERVICE OF PROCESS THEREAFTER

Pursuant to current law in the Ninth Circuit, the period within which the party to be brought in must recive notice of the action is limited to the period of the statute of limitations. Allen v. Veterans Administration, supra; Williams v. United States, 711 F.2d 893, 898 (9th Cir. 1983). This literal interpretation of the requirements of 15(c) is also followed in the Seventh Circuit. Hughes v. United States, 701 F.2d 56, 58 (1982); Stewart v. United States, 655 F.2d 741, 742 (1981).

Based on such interpretation, Petitioner's case was dismissed because the United States Attorney's office and the

Attorney General were not served with the complaint within the statute of limitations.

In conflict with the Ninth Circuit interpretation is that of the First, Second, Third and Sixth Circuits. These Circuits hold that under Fule 15(c) the period within which the party to be brought in must receive notice of the action includes the reasonable time allowed under the Federal Rules for service of process. Ingram v. Kumar, 585 F.2d 566, 571-72 (1978); Murray v. United States Postal Service; 569 F.Supp. 794, 797 (N.D.N.Y. 1983); also see, Gabriel v. Kent General Hospital, Inc., 95 F.R.D. 391 (3d Cir. 1982); United States v. Coffey, 100 F.R.D. (1st Cir. 1983); and Ringrose v. Engelberg, 692 F.2d 410 (6th Cir. 1982).

The latter interpretation is permissible and desirable; it carries out the rational purpose of the 1966 Amendment.

Section (a) of Rule 15 contains the general admonition that "leave [to amend] shall be freely given when justice so requires." This case presents an excellent situation for application of this rule. Indeed, it can well be argued that the latter rule makes particular sense as applied to an Federal Tort Claims Act case. The requirement that the United States be sued in its own name rather than in the name of the offending agency is a trap for the unwary that has often been criticized for preventing too many deserving claimants from obtaining relief against the government. See 6 Wright & Miller, Fed.Prac. & Proc. §1502 (1971 ed.) citing, inter alia Byse, "Sueing the Wrong Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform", 77 Harv.L.Rev. 40 (1963).

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Where, as here, Petitioner, an Federal Tort Claims Act claimant, had duly complied with Administrative procedure, had subsequently filed a timely complaint, had thereafter effected service of process within a reasonable time, and has only erred by naming the "Veterans Administration" as Defendant instead of the "United States", justice should certainly be better served if the latter interpretation is followed.

III.

FEDERAL RULES POLICY DEMANDS THE MORE LIBERAL INTERPRETATION

Petitioner in the present case filed his initial complaint within the statute of limitations. However, his counsel named the wrong defendant. Because of the improper pleading by his counsel, Petitioner, who has been seriously injured,

has been forever barred by the District Court and Ninth Circuit Court of Appeal from having the merits of his case heard.

In Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Supreme Court held that

> "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Id. at 181-82.

In reversing the First Circuit in a case where the Court had dismissed the appeal because of defective notice, the Supreme Court in Foman v. Davis, supra, stated, "It is too late in the day and entirely contrary to the spirit of the

Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. [Emphasis added.] Ed. at 185.

In Surowitz v. Hilton Hotels, 383 U.S. 363, 88 S.Ct. 845, 15 L.Ed.2d 807 (1966), the Supreme Court reversed the Seventh Circuit dismissal of Plaintiff's complaint because of a technicality.

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all. ...The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissal.... If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as

possible guarantee that bona fide complaints be carried to an adjudication on the merits. [Emphasis added.] Id. at 373.

The Ninth Circuit Court of Appeal's decision to dismiss this case because of a misstep by counsel is contrary to the approach used by the Supreme court as enunciated in Foman, supra, and Surowitz, supra.

IV.

CONCLUSION

The disharmony among the Circuits should be resolved -- in favor of allowing reasonable relation back when actual notice is given even in technically

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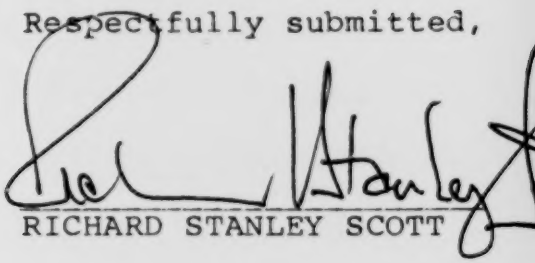
deficient form. The issue must be resolved by this honorable Court.

Respectfully submitted,



RICHARD STANLEY SCOTT

DATED: December 12, 1986

APPENDIX

Filed 9/30/86

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED G. GREEN,	)	CV NO. 85-6230
	)	
Plaintiff,	)	DC NO. CV85-
	)	
v.	)	1953-R
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
Defendant.	)	
	)	

Appeal from the United States

District Court for the

Central District of California

Honorable Manuel L. Real, District Judge,

Presiding

Submitted August 27, 1986

Before: FARRIS, BEEZER, and BRUNETTI,

Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

The panel unanimously agrees that this case may be submitted without oral argument.

Ted G. Green appeals the dismissal of his action. We affirm.

A claimant must file a complaint against the United States in district court within six months of the date of the mailing of the letter denying his administrative claim. See 28 U.S.C. §§1346(b), 2401(b), 2679(a); Allen v. Veterans Administration, 749 F.2d 1386, 1388 (9th Cir. 1984). Our de novo review of the record reveals that Green's claim was dismissed on March 22, 1984. On September 19, 1984 Green filed a complaint for medical malpractice in district court, naming the Veterans Administration as defendant. The complaint was served on the U.S. Attorney on December 19, 1984 and on the Attorney General on March 8,

1985. The Veterans Administration moved to dismiss on the ground that it was not a proper party. That motion was granted on April 10, 1985.

On March 21, 1985 (before the court rlued on the dismissed motion) Green filed a second complaint properly naming the United States as defendant. The United States moved to dismiss the complaint as untimely and improperly served. The district court dismissed the second complaint as untimely on June 27, 1985. Green timely appeals.

We reject Green's contention that the second complaint should relate back to the first complaint. He misread Fed.R.Civ.P. 15(c).

The terms of the government's consent to be sued defined the court's jurisdiction to entertain the suit. Lehman v. Nakshian, 453 U.S. 156, 160 (1981). The

statute of limitations is a condition of the government's waiver of sovereign immunity. Green's failure to name the United States as a party until March 21, 1985 even though his claim was denied on March 22, 1984 is fatal. The six month statute had run almost six months to the day before he filed his complaint. We recognize that 15(c) permits an amended complaint to add a new defendant but Green never amended his complaint. He instituted a separate action. Further, even if he had attempted to amend, the new defendant (United States) had no notice of the institution of the action within the statute of limitations period. Schiavone, et al. v. Fortune, aka Time, Inc., 106 S.Ct. 2379, 2385 (1986).

AFFIRMED.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the Court.

PETITION FOR REHEARING (FRAP 40)

Filing time:

A petition for rehearing may be filed within fourteen (14) days after judgment.

Purpose:

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which

appears to have been overlooked by the panel.

3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

Petitions which merely reargue the case shall not be filed.

Statement of Counsel:

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations described above (in Purpose Section) exist. The points to be raised must be clearly stated. Lacking such a statement, the petition will not be filed.

Form:

The fifteen (15) page limit allowed by the rule must be observed. Please use 8-1/2 x 11 inch paper. Three (3) copies of the petition and the original are

required unless the petition includes a suggestion for rehearing en banc. If if does, thirty-three (33) copies and the original must be filed.

The petition must be directed to the Clerk of Court, contain an original signature of the counsel/pro per litigant submitting the petition and indicate complete proof of service to all parties.

BILL OF COSTS

(FRAP 39) (LOCAL RULE 14)

If a party is allowed costs, the bill of costs must be filed within fourteen (14) days of entry of judgment. (See attached form for additional information.)

ISSUANCE OF MANDATE (FRAP 41)

The mandate issues twenty-one (21) days after entry of judgment unless the Court directs otherwise. A timely

petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will issue seven (7) days later. If a stay of mandate is sought, an original and three (3) copies of the motion must be filed.

PETITION FOR CERTIORARI

For information concerning the filing of this petition, refer to the Rules of the Supreme Court of the United States. Appointed counsel should refer to Section (4)c of the Appendix to the Rules of the United States Court of Appeals for the Ninth Circuit with regard to the obligation to file a petition for certiorari.

CA9-086 (5/7/82)

Office of District Counsel
VETERANS ADMINISTRATION
2022 Camino Del Rio North
San Diego, CA 92108

CERTIFIED MAIL

May 3, 1985

Mr. Richard Stanley Scott
Attorney at Law
9595 Wilshire Blvd.
Suite 610
Beverly Hills, CA 90212

RE: Administrative Tort Claim of
Ted Green SSN 560 66 6929

Dear Mr. Scott:

We have investigated the claim of your client for chronic skin rash, memory loss, and loss of use of the left arm and

hand, allegedly caused by surgery performed at Veterans Administration Medical Center, Loma Linda on November 30, 1982. We can find no medical evidence to support claimed skin rash or memory loss. With regard to the claim for loss of use of the left arm, witnesses advise that there was no surgical intervention in the area of nerves which you claim have been injured. Furthermore, all necessary precautions were taken to protect the arm during surgery. During lengthy surgery of this type, such injury is known to and does occur in the absence of negligence. All claims are denied.

We invite your attention to the provisions of the Federal Tort Claims Act (28 U.S.C. §§1345(b) and 2675) which provide, in effect, that a tort claim which is

administratively denied may be presented to a Federal District Court for judicial consideration. Such suit must be initiated within six months after the date of mailing of this notice of denial (28 U.S.C. §2401(b)).

Prior to the expiration of the six-month period provided for commencement of suit, you may file a written request for reconsideration of our denial of your claim. The request should be directed to General Counsel (02), VA Central Office, 810 Vermont Avenue, N.W., Washington, D.C. 20420. Upon the timely filing of a request for reconsideration, the Veterans Administration shall have six months from the date of filing in which to make a final disposition of the claim, and your option to file a suit in Federal Court

shall not accrue until six months after the filing of a request for reconsideration (28 CFC §14.9).

Sincerely,

L. H. BENRUBI
District Counsel

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Asst. United States Attorney
Chief, Civil Division
WILLIAM B. SPIVAK, JR.
Asst. United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 894-2447
Attorneys for Defendant

Filed
6/27/85

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TED GREEN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CV NO. 85-1953 ORDER FOR DISMISSAL WITH PREJUDICE

Defendant's motion to dismiss having come on regularly for hearing on June 24, 1985 before the Honorable Manuel L. Real, Chief Judge, Presiding, plaintiff appearing by Richard Stanley Scott, defendant appearing by Robert C. Bonner, United States Attorney and William B. Spivak, Jr., and the court finding that plaintiff's administrative claim was denied by a letter of final denial dated March 22, 1983, and the court finding that the action is forever barred by limitations pursuant to 28 U.S.C. §2401(b), and good cause appearing therefore,

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above-entitled action shall be, and hereby is, dismissed with prejudice.

DATED: This 27th day of June, 1985.

_____
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Asst. United States Attorney
Chief, Civil Division

_____
WILLIAM B. SPIVAK, JR.
Asst. United States Attorney
Attorneys for Defendant

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Asst. United States Attorney
Chief, Civil Division
WILLIAM B. SPIVAK, JR.
Asst. United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 894-2447
Attorneys for Defendant

Filed
4/10/85

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TED G. GREEN, Plaintiff, v. VETERANS ADMINISTRATION, Defendant.	No. CV 84-7030R ORDER DISMISSING ACTION

The above-entitled action having come on regularly for hearing on April 1, 1985 before the Honorable Manuel L. Real, Chief Judge, Presiding, plaintiff appearing by Richard Stanley Scott, defendant appearing by Robert C. Bonner, United States Attorney and William B. Spivak, Jr, Assistant United States Attorney, and the court having fully considered the matter and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-entitled action of Ted G. Green v. Veterans Administration, No. CV 84-7030-R, shall be, and hereby is, dismissed with prejudice.

DATED: This 10th day of April, 1985.

_____
UNITED STATES DISTRICT JUDGE

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///

PRESENTED BY:

ROBERT C. BONNER

United States Attorney

FREDERICK M. BROSIO, JR.

Asst. United States Attorney

Chief, Civil Division

_____

WILLIAM B. SPIVAK, JR.

Asst. United States Attorney

Attorneys for Defendant

CERTIFICATE OF SERVICE

[Supreme Court Rules 28.3, 28.4, 28.5(b); Federal Rule of Civil Procedure 4(d)(4)]

In compliance with Supreme Court Rules and Federal Rules of Civil Procedure, I have caused to be placed in the United States mail, with first-class postage fully prepaid and properly addressed to the Clerk of this Court, forty (40) copies of Petitioner's Petition for a Writ of Certerori, to counsel for Respondent William B. Spivak, Jr., Assistant United States Attorney, 1100 United States Courthouse, 312 North Spring Street, Los Angeles, CA 90012, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, three (3) copies each of Petitioner's Petition for a Writ of Certiorari, all as required by Supreme Court Rules 28.3 and 28.4, and I have caused to be sent by Certified Mail three (3) copies each to the Attorney General

of the United States, at the Office of the U.S. Attorney General, 10th & Constitution Ave. NW, Washington, D.C. 20530, and the Veterans Administration, District Counsel's Office, at the Federal Building, Room 7221, 11000 Wilshire Blvd., Los Angeles, California 90024, all as required by F.R.Civ.P. 4(d)(4).

This Certificate of Service is executed pursuant to Supreme Court Rule 28.5(b).

I so certify.

Dated this 17th day of December, 1986, at Santa Monica, California.

ORIGINAL SIGNED

RICHARD STANLEY SCOTT

(2)

No. 86-1020

In the Supreme Court of the United States

OCTOBER TERM, 1986

TED G. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

7/F

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1020

TED G. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals, in affirming the dismissal of his complaint, failed properly to apply Fed. R. Civ. P. 15(c).

1. In October, 1982, petitioner filed a timely administrative claim with the Veterans Administration alleging that he had suffered injuries arising from medical malpractice in June, 1981, at Wadsworth Veterans Administration Hospital in West Los Angeles. On March 22, 1984, the Veterans Administration denied petitioner's claim (Pet. App. A2). From this date, petitioner had six months in which to file a judicial action under the Federal Tort Claims Act. See 28 U.S.C. 2401(b).

On September 19, 1984, three days before the six-month statute of limitations had run, petitioner filed a complaint for medical malpractice in which he named the Veterans

Administration as defendant (Pet. App. A2). The complaint was served on the Veterans Administration on October 26, 1984.[1] The complaint was also served on the United States Attorney and the Attorney General on December 19, 1984, and March 8, 1985, respectively (*id.* at A2-A3).

The Veterans Administration moved to dismiss on the ground that it was not a proper party. The Federal Tort Claims Act creates a remedy against the United States, but not against its agencies and subdivisions, for personal injury arising out of the negligence of its employees. See 28 U.S.C. 1346(b), 2679(a). The district court granted the motion on April 10, 1985 (Pet. App. A16).

On March 21, 1985, before his earlier complaint had been dismissed, petitioner filed another complaint that named the United States as defendant (Pet. App. A3). This complaint was based on the same facts underlying petitioner's first complaint. The United States moved to dismiss the complaint as untimely. On June 27, 1985, the district court granted the motion (*id.* at A13).

Petitioner timely appealed the district court's dismissal of his second complaint.[2] The court of appeals affirmed (Pet. App. A1-A4). The court observed that the statute of limitations is a condition of the government's waiver of sovereign immunity (*id.* at A4). Pursuant to 28 U.S.C. 2401(b), petitioner was required to file his complaint against the United States within six months after his administrative claim had been denied. He failed to do so. Rather, he waited until

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[1]By letter dated November 19, 1984, the Veterans Administration informed petitioner that, because the agency was not a proper party to the action, his attempt to serve the complaint was inappropriate and ineffective.

[2]Petitioner did not appeal the dismissal of his first complaint.

nearly twelve months had elapsed before he filed his complaint against the United States. Petitioner's failure to file a timely complaint, the court concluded, was fatal to his claim (*ibid.*).

The court noted that Rule 15(c) in some cases permits the addition of a new defendant by means of an amended complaint. In the instant case, however, petitioner failed even to comply with the requirements of Rule 15(c): "[Petitioner] never amended his complaint. He instituted a separate action" (Pet. App. A4). Moreover, stated the court, dismissal would have been appropriate even if petitioner had attempted to amend his complaint because the United States had no notice of the action within the six-month limitations period (*ibid.*).

2. The decision of the court of appeals is clearly correct and, indeed, is mandated by this Court's decision in *Schiavone* v. *Fortune, a/k/a/ Time, Inc.*, No. 84-1839 (June 18, 1986).

a. Petitioner contends (Pet. 17-20) that his second complaint should relate back to his first complaint because Rule 15(c) permits relation back so long as the proper party receives notice of the action within a reasonable time after the statute of limitations has run. This Court has expressly rejected that argument. In *Schiavone* (slip op. 9-11), this Court held that the plain language of Rule 15(c) requires that the proper party have notice of the claim "within the period provided by law for commencing the action:"

> We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

> We are not inclined, either, to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the action against" the defendant. An action is commenced by the filing of a complaint and, so far as [the defendant here] is concerned, no complaint against it was filed [within the statute of limitations].
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> The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.

In the instant case, as in *Schiavone*, the defendant did not have notice of the filing of a complaint within the limitations period. The six-month limitations period expired on September 22, 1984. Petitioner waited until September 19, 1984, to file his suit, and he named an improper party, the Veterans Administration, as defendant. Even the Veterans Administration did not receive notice of the complaint until October 26, 1984.[3] Not until December 19, 1984, and March 8, 1985, did the United States Attorney and the Attorney General respectively receive notice of the complaint against

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[3]Because the Veterans Administration had no notice of the action until *after* the statute of limitations had run, this Court need not address petitioner's contention (Pet. 13-16) that timely notice to the agency should have been imputed to the United States. Cf. *Schiavone*, slip op. 11 n.8; *Williams* v. *United States*, 711 F.2d 893, 898 (9th Cir. 1983); *Hughes* v. *United States*, 701 F.2d 56, 58 (7th Cir. 1982).

the Veterans Administration. Not until March 21, 1985, did petitioner finally file a complaint that named the United States as defendant. In short, the United States did not have timely notice of petitioner's complaint. The court of appeals correctly held that this absence of notice was fatal to petitioner's "relation back" argument. See *Schiavone*, slip op. 9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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